7-10-2009

Order (MICHAEL J. HAWK)

Elizabeth E. Long
Superior Court of Fulton County

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

MICHAEL J. HAWK, DONALD M. HILL, and JAYE M. JACKSON	)(	
Plaintiffs,	)(	
v.	)(	**Civil Action File No. 2009CV162588**
STEVEN ODOM and MARTIN KIDDER	)(	
Defendants.	)(	

ORDER

On July 1, 2009, Counsel appeared before this Court to present oral argument on Defendant Odom's Motion for Summary Judgment and Defendant Kidder's Motion for Summary Judgment. After hearing the arguments made by counsel and reviewing the briefs submitted on the motions and the record in the case, the Court finds as follows:

I. Facts

This case arises out of a private placement offering ("the Transaction") through which Plaintiffs purchased stock in Verso Technologies, Inc. ("Verso"), a Minnesota corporation that is currently in bankruptcy. Defendant Steven A. Odom ("Odom") was the CEO of Verso, and Defendant Martin Kidder ("Kidder") was the CFO of Verso.

On February 21, 2008, each Plaintiff executed a subscription agreement memorializing their purchase of Verso stock. Plaintiffs' representative for this transaction was Mr. Donald J. Slowinski ("Slowinksi"). Prior to Plaintiffs' purchase of Verso stock, Slowinski met with Odom and was the sole conduit of information between Odom and Plaintiffs regarding this Transaction. During their meeting,

Odom gave Slowinski a PowerPoint presentation about Verso that Plaintiffs allege contains material misrepresentations.

Plaintiffs filed this action asserting claims for common law fraud, negligent misrepresentation, and securities fraud under Georgia law. Specifically, Plaintiffs allege that (1) Odom made material misrepresentations and omissions regarding Verso to Slowinski who passed this misinformation on to Plaintiffs, and that (2) Kidder sent Plaintiffs subscription agreements which were misleading in light of information that Kidder failed to disclose.

II. Standard

A court should grant a motion for summary judgment pursuant to O.C.G.A. § 9-11-56 when the moving party shows that no genuine issue of material fact remains to be tried and that the undisputed facts, viewed in the light most favorable to the non-movant, warrant summary judgment as a matter of law. Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991). The moving party need only eliminate one essential element of a party's claim to prevail on summary judgment. Real Estate Int'l Inc. v. Buggah, 220 Ga. App. 449, 451 (1996).

III. Kidder's Motion for Summary Judgment

The record shows that Kidder's only involvement in the Transaction was to forward subscription agreements to Plaintiffs. Plaintiffs concede that Kidder made no misrepresentations to them, or to Slowinski, and that the subscription agreements did not contain any misrepresentations. There is no dispute that Plaintiffs' claims against Kidder rest on alleged omissions only.

Kidder argues that he had no duty to disclose information to Plaintiffs and, thus, Plaintiffs' fraud claims against him fail as a matter of law.

Actionable fraud may be based on "[s]uppression of a material fact which a party is under an obligation to communicate." O.C.G.A. § 23-2-53. "The obligation to communicate may arise from the

confidential relations of the parties or from the particular circumstances of the case." Id. Plaintiffs do not dispute that they have never shared a confidential relationship with Kidder. Moreover, Plaintiffs have not established circumstances in this case that would impart to Kidder a duty to disclose. "Absent a confidential relationship, no duty to disclose exists between parties in arms-length business transactions." Lilliston v. Regions Bank, 288 Ga. App. 241, 244 (2007); see also, Bogle v. Bragg, 248 Ga. App. 632, 636 (2001). The record reveals that this case arises from an arms-length business transaction.

Defendant Kidder's motion for summary judgment is hereby **GRANTED**.

IV. Odom's Motion for Summary Judgment

Plaintiffs' claims against Odom are based on both misrepresentations and omissions. Specifically, Plaintiffs allege that the PowerPoint presentation they received regarding Verso contained misrepresentations, and that the presentation was especially misleading in light of omissions of information by Odom. Plaintiffs point to four specific omissions which, if known to them prior to the transactions, would have ended their interest in buying Verso stock. The four omissions cited by Plaintiffs are: (1) Verso was at risk of receiving a "going concern" exception to its December 31, 2007 financial audit; (2) Verso was generally unable to pay its debts as they became due; (3) Verso was at risk of losing its NASDAQ listing because of a failure to meet the minimum shareholders' equity requirements; and (4) Verso had booked fictitious sales. In light of these alleged omissions, Plaintiffs argue that it is a question of fact for the jury to determine whether Odom represented that Verso was merely struggling when it was, in fact, already dead on the vine.

In support of his motion for summary judgment, Odom first argues that the merger clause contained in the subscription agreement bars Plaintiffs' claims. Specifically, the merger clause numbered section 9 in the agreement, provides that "[t]his Subscription Agreement contains the entire

agreement of the parties with respect to the matter set forth herein and there are no representations, covenants or other agreements except as stated or referred to herein or as are embodied in the Offering Documents." There are only two documents involved in the Transaction: (1) the subscription agreement and (2) the PowerPoint presentation about Verso which was given by Odom to Slowinski and passed on to Plaintiffs. Therefore, the only offering document to which the merger clause refers is the PowerPoint presentation. As the merger clause incorporates into the Parties' agreement the representations of the PowerPoint, the merger clause does not operate to bar Plaintiffs' claims based on misrepresentations found in the PowerPoint, or information in the PowerPoint presentation which is fraudulent in light of omitted information.

Next, Odom argues that he is entitled to summary judgment because Plaintiffs cannot have justifiably relied on Odom's representations. In support of this argument, Odom maintains that Slowinski's deposition testimony shows that he generally distrusted Odom, and that Slowinski's general distrust of Odom must be imputed to Plaintiffs because Slowinski was their agent for this Transaction.

Despite Odom's arguments, many questions of fact persist that preclude the grant of summary judgment. Such questions of fact include: (1) whether plaintiffs relied on the representations made in the PowePoint presentation and if such reliance was reasonable, (2) whether Odom knew at the time he provided the PowerPoint presentation to Plaintiffs (through Slowinski) that Verso was on the brink of bankruptcy, and (3) whether Slowinski was, in fact, an agent of Plaintiffs so that under Georgia law his knowledge of the transactions and the player involved may be imputed to Plaintiffs.

Defendant Odom's motion for summary judgment is hereby **DENIED**.

V. Plaintiffs Offer of Rescission

In their First Amended and Restated Complaint, Plaintiffs offer rescission of the subscription agreement as an alternative to damages. As Defendants are not parties to the subscription agreement which was entered into between Plaintiffs and Verso only, rescission is not an available remedy. Accordingly, this case shall proceed as one for damages only against Defendant Odom.

SO ORDERED this 10th day of July, 2009.

ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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